AND
BRIEFS

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IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

CORRECTED COPY

v.

JESUS MESA, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF TEN LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

INTRODUCTION & SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. HERNÁNDEZ'S CITIZENSHIP STATUS, LIKE ANY UNKNOWN FACT, IS NOT PART OF THE "CLEARLY ESTABLISHED" INQUIRY 2

A. The "clearly established" analysis considers only facts known to officers at the time of their conduct 3

B. Mesa was unaware of Hernández's citizenship status and connections to the United States 7

II. QUALIFIED IMMUNITY DOES NOT PROTECT MESA 9

A. It is clearly established that fatally shooting someone without justification violates the Constitution 9

B. An officer is not protected by qualified immunity if he acted without a reasonable factual basis to conclude that a potential exception applied 11

TABLE OF CONTENTS
(continued)

Page

C. Mesa acted without a reasonable factual basis to conclude that a potential exception applied 14

III. PROTECTING MESA FROM LIABILITY HERE UNDERMINES RATHER THAN FURTHERS THE GOALS OF QUALIFIED IMMUNITY 20

A. Qualified immunity applies only when it furthers the doctrine's purposes 20

B. Granting immunity here furthers none of the doctrine's purposes 22

C. Immunizing Mesa undermines the goals of qualified immunity 25

CONCLUSION 27

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Al-Amin v. Smith,
511 F.3d 1317 (11th Cir. 2008) 11

Ali v. Rumsfeld,
649 F3d 762 (D.C. Cir. 2011) 6

Ashcroft v. al-Kidd,
563 U.S. 731 (2011) 22, 24

Barr v. Matteo,
360 U.S. 564 (1959) 20, 26

Beck v. Ohio,
379 U.S. 89 (1964) 4

Boumediene v. Bush,
553 U.S. 723 (2008) 3

Brigham City v. Stuart,
547 U.S. 398 (2006) 5

Butz v. Economou,
438 U.S. 478 (1978) ..... *passim*

Crawford-El v. Britton,
523 U.S. 574 (1998) 21

DeMayo v. Nugent,
517 F.3d 11 (1st Cir. 2008) 5, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Filarsky v. Delia,
132 S. Ct. 1657 (2012) 22

Gregoire v. Biddle,
177 F.2d 579 (2d Cir. 1949) 21, 22, 25

Harlow v. Fitzgerald,
457 U.S. 800 (1982) ..... *passim*

Illinois v. Rodriguez,
497 U.S. 177 (1990) 14

Imbler v. Pachtman,
424 U.S. 409 (1976) 21

Kendall v. Stokes,
44 U.S. 87 (1845) 22

Key v. Grayson,
179 F.3d 996 (6th Cir. 1999) 7

Kingsley v. Hendrickson,
135 S. Ct. 2466 (2015) 4

Kwai Fun Wong v. United States,
373 F.3d 952 (9th Cir. 2004) 7

Lebron v. Rumsfeld,
670 F.3d 540 (4th Cir. 2012) 7

Lee v. Ferraro,
284 F.3d 1188 (11th Cir. 2002) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Malley v. Briggs,
475 U.S. 335 (1986) 24

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 20

Maryland v. King,
133 S. Ct. 1958 (2013) 13

Moreno v. Baca,
431 F.3d 633 (9th Cir. 2005) 5, 14

Myers v. Patterson,
819 F.3d 625 (2d Cir. 2016) 13

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 8

Owen v. City of Independence,
445 U.S. 622 (1980) 21

Pearson v. Callahan,
555 U.S. 223 (2009) 2, 9, 18, 20

Petta v. Rivera,
143 F.3d 895 (5th Cir. 1998) 10

Pierson v. Ray,
386 U.S. 547 (1967) 21

Rasul v. Myers,
563 F.3d 527 (D.C. Cir. 2009) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Reid v. Covert,
354 U.S. 1 (1957) 10

Richardson v. McKnight,
521 U.S. 399 (1997) 21, 22

Rochin v. California,
342 U.S. 165 (1952) 10

Rodriguez v. Farrell,
280 F.3d 1341 (11th Cir. 2002) 6

Rodriguez v. Swartz,
111 F. Supp. 3d 1025 (D. Ariz. 2015) 17

Russo v. City of Bridgeport,
479 F.3d 196 (2d Cir. 2007) 11

Samson v. California,
547 U.S. 843 (2006) 5

Saucier v. Katz,
533 U.S. 194 (2001) 3, 22

Scheuer v. Rhodes,
416 U.S. 232 (1974) 23

Tennessee v. Garner,
471 U.S. 1 (1985) 10

Terry v. Ohio,
392 U.S. 1 (1968) 4, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Tower v. Glover,
467 U.S. 914 (1984) 22

United States v. Lanier,
520 U.S. 259 (1997) 10

United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 2, 3, 10, 11

Utah v. Strieff,
136 S. Ct. 2056 (2016) 12, 14, 26

Wyatt v. Cole,
504 U.S. 158 (1992) 23, 25, 26

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... *passim*

OTHER AUTHORITIES

3 WILLIAM BLACKSTONE, COMMENTARIES 20

Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993) 4

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Page(s)

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Santiago David Távara, *Niños nacidos en EE.UU. que viven en México necesitan documentos*, EL TIEMPO LATINO (Feb. 25, 2015), goo.gl/AGCVno 15

Alana Semuels, *Crossing the Mexican-American Border, Every Day*, THE ATLANTIC (Jan. 25, 2016), goo.gl/d5lVp8 ..... 16, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

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STATEMENT OF INTEREST[1]

Amici are ten law professors who research, write, and teach about qualified immunity, constitutional law, and constitutional litigation. *See* Appendix (listing *Amici*). *Amici* have an interest in how qualified immunity operates and are concerned with the way the Fifth Circuit framed the "clearly established" question. The qualified-immunity issue before the Court is within *Amici*'s areas of expertise.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If Mesa had shot and killed a fifteen-year-old United States citizen under the circumstances alleged here, there would be no doubt that he violated the Constitution, and clearly so. He would not deserve immunity.

The qualified-immunity question in this case is this: Does the result change because of facts—specifically, the boy's citizenship status and his connections to the United States—that Mesa did not know at the time of the shooting? The answer is no, because qualified immunity does not turn on facts that officers do not know when they act.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

Focusing then on the facts known to Mesa: Mesa shot an unarmed boy in Mexico near the U.S. border without any provocation or justification. Because that is a clear violation of the Constitution, and because granting qualified immunity in these circumstances would run counter to the doctrine's purpose, Mesa should be subject to suit. He should not be permitted to capitalize on the "fortuitous" circumstance that the victim of his callous conduct happened to be a Mexican citizen.

ARGUMENT

I. HERNÁNDEZ'S CITIZENSHIP STATUS, LIKE ANY UNKNOWN FACT, IS NOT PART OF THE "CLEARLY ESTABLISHED" INQUIRY

The qualified-immunity inquiry asks two separate questions: (1) Did the officer violate a constitutional right, and (2) was that right clearly established at the time of the officer's conduct? *Pearson v. Callahan*, 555 U.S. 223 (2009). [2] Hernández's citizenship and connections to the United States are facts that may be relevant to the first question—whether Mesa violated Hernández's constitutional rights. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This brief does not address the first question, and instead assumes that the officer violated a constitutional right.

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[2] A court may take up either question first and, if it finds the answer is "no," it may grant immunity without considering the other question. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

This brief instead focuses on the second question: whether it was unclear that Mesa's conduct was unlawful. Hernández's citizenship and connections to the United States are irrelevant to that question, because Mesa was not aware of them at the time he acted. In determining that Mesa was entitled to qualified immunity, however, the Fifth Circuit relied on those facts; the court asked whether it was clearly established that shooting "a non-citizen with no connections to the United States" in Mexico violated the U.S. Constitution. Pet. App. 4a. Based on that formulation of the question, the Fifth Circuit held that Mesa is immune from suit. Pet. App. 4a–7a (citing, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Verdugo-Urquidez*, 494 U.S. 259).

The Fifth Circuit erred in framing the inquiry this way. It instead should have asked whether the shooting was clearly unlawful given the circumstances known to Mesa *at the time he pulled the trigger*.

A. The "clearly established" analysis considers only facts known to officers at the time of their conduct.

Qualified immunity is unavailable where "it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (emphasis added). This "clearly established" inquiry focuses on the moment of conduct—by probing the facts that the officer knew and observed at the time of the incident, and the state of the law at that time. *Id.* The inquiry is objective rather than subjective; it asks

not whether *this* officer in fact knew his conduct was unlawful, but instead whether a reasonable officer would have known the challenged conduct was unlawful in the circumstances the officer confronted. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

In assessing the availability of qualified immunity, therefore, the first step is to identify the information known by the officer. Like other standards that evaluate an officer's objective reasonableness in the specific situation he confronts, the qualified-immunity standard asks courts to consider "the facts available to the officer at the moment [of his conduct]," and only those facts. *See Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (reasonable suspicion); *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) (probable cause). Later-discovered facts are irrelevant, even when those facts might change the way a reasonable officer would handle the situation. As the Court has explained in the analogous context of the Fourth Amendment reasonableness standard: "A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). *See generally* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993).

For example, when officers engage in a suspicionless search or seizure of someone who is on parole, the qualified-immunity inquiry takes into account the individual's parole status only if the officers knew that status at the time of the search or

seizure. *Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005). If the officers were "aware that [the individual] was on parole," the Constitution permits them to undertake the suspicionless search. *Samson v. California*, 547 U.S. 843, 846, 856–57 (2006). But if the individual's parole status is "unknown to [the officers] at the time of their actions and [i]s not a fact on which [they] relied," it is not a fact that can "justify their conduct." *Moreno*, 431 F.3d at 642. In that circumstance, the qualified-immunity inquiry asks simply whether a reasonable officer would believe he could engage in a suspicionless search or seizure generally, and the answer is clearly no. *Id.* Qualified immunity is unavailable.

The same analysis applies when officers enter a home without probable cause and discover exigent circumstances only after entry. *DeMayo v. Nugent*, 517 F.3d 11, 15–16 & n.6 (1st Cir. 2008). In assessing the applicability of qualified immunity, courts ask what the officers knew at the time of their conduct, not what they later discovered. Where officers are aware of facts that provide "an objectively reasonable basis for believing" that exigent circumstances exist at the time of the warrantless search, their conduct is lawful. *Brigham City v. Stuart*, 547 U.S. 398, 400–04 (2006). But where an officer is ignorant of the exigency, the exigency is irrelevant to the "clearly established" analysis. In that case, the question is whether a reasonable officer would have known it was unlawful to engage in a warrantless search generally (*i.e.*, without exigent circumstances). *DeMayo*, 517 F.3d

at 18. Because the unlawfulness of such a search is clear, qualified immunity is inappropriate. *Id.* "[O]bjectively unreasonable [conduct] does not become reasonable simply because [of] the fortuity of the circumstances." *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002).

The standard works both ways: Objectively reasonable conduct does not become *un*reasonable because of facts that an officer does not know. Suppose, for example, that an officer handcuffs a suspect using a "common non-excessive handcuffing technique," but because of the suspect's recent elbow surgery, the handcuffing causes injuries so severe that the suspect's arm must later be amputated. *See Rodriguez v. Farrell*, 280 F.3d 1341, 1352 (11th Cir. 2002). The officer nevertheless deserves immunity, because courts "do not use hindsight to judge the acts of police officers; [they] look at what they knew (or reasonably should have known) at the time of the act." *Id.* at 1352–53. "What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Id.* at 1353. Because it would be unreasonable to demand omniscience from an officer, the law does not equate what we know *now* with what the officer knew *then*.

The cases on which the Government relied below only bolster the point. In *Ali v. Rumsfeld*, for example, the D.C. Circuit accounted for the citizenship status of the plaintiffs in the qualified-immunity analysis because the officials knew that

the plaintiffs were "aliens held in Iraq and Afghanistan," not U.S. citizens. 649 F.3d 762, 771 (D.C. Cir. 2011); *accord Lebron v. Rumsfeld*, 670 F.3d 540, 557–59 (4th Cir. 2012) (same, for known "terrorist suspect"); *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009) (per curiam) (same, for enemy combatants at Guantanamo Bay). And in *Kwai Fun Wong v. United States*, the Ninth Circuit considered the plaintiff's alien status, because the INS officials knew that the plaintiff was an "alien[] in . . . rather unique circumstances." 373 F.3d 952, 976 (9th Cir. 2004); *see also Key v. Grayson*, 179 F.3d 996, 999–1000 (6th Cir. 1999) (prisoner's status correctly considered when known at the time).

The proper inquiry here thus is not whether Mesa violated clearly established law by shooting "a non-citizen with no connections to the United States." Pet. App. 4a. Unless Mesa was aware that Hernández was a non-U.S. citizen who lacked connections to the United States, the Court should not import those facts into the "clearly established" inquiry. Just as an individual's elbow surgery or parole status is irrelevant at this stage of the analysis when unknown to an officer, so too is citizenship status.

B. Mesa was unaware of Hernández's citizenship status and connections to the United States.

At the time of the shooting, Mesa was not aware that Hernández was a non-citizen without

connections to the United States.[3] Those facts therefore do not inform the qualified-immunity inquiry.

As alleged in the Second Amended Complaint ("Complaint"), when Mesa shot and killed Hernández, Mesa was aware of the following:

- Hernández was a boy. Second Am. Compl. ¶ 26.
- Hernández and his friends, all young boys, were laughing and playing near the United States–Mexico border. *Id.* ¶ 25.
- Hernández and his friends were running to and from the border fence, on the Mexican side of the border. *Id.*
- Mesa approached the boys and forcibly detained one of them. *Id.* ¶ 26.
- Hernández retreated and stood beneath a bridge. *Id.*
- Hernández did not appear to be armed. *Id.* ¶ 1.
- Hernández did not threaten Mesa in any way. *Id.* ¶ 26.

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[3] Indeed, Mesa has effectively conceded as much at the motion-to-dismiss stage. Before the district court and the court of appeals, he never raised any argument that, on the facts alleged in the complaint, he could have known that Hernández was a non-citizen without ties to the United States. He has thus forfeited any such argument. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015).

- Hernández offered no resistance. *Id.* ¶ 3.
- Mesa, who stood on the U.S. side of the border, pointed his gun at Hernández and fired at least two bullets at him. *Id.* ¶ 26.
- Hernández was struck by the gunfire and died. *Id.*

These facts—those that, according to the Complaint, Mesa directly observed—are the only facts incorporated into the "clearly established" analysis. Mesa did not know Hernández's citizenship status, or the quantity or quality of his ties with the United States. Those later-discovered facts, therefore, do not inform the inquiry. The question is simply: Did Mesa violate clearly established law when he shot and killed a boy just on the Mexican side of the border, when the boy had offered no resistance, had no weapon, and had not threatened him?

II. QUALIFIED IMMUNITY DOES NOT PROTECT MESA

Given the facts known to Mesa at the time of the shooting, Mesa engaged in conduct that no reasonable officer would believe is constitutional. He therefore is not entitled to qualified immunity.

A. It is clearly established that fatally shooting someone without justification violates the Constitution.

No reasonable officer could have believed that Mesa's conduct "complie[d] with the law." *Pearson*, 555 U.S. at 244. On the facts alleged, Mesa fired a

lethal shot at a person who had retreated, who was "unarmed and unthreatening," and who "showed no resistance to [Mesa's] demands." Second Am. Compl. ¶¶ 3, 26. That conduct clearly violates the Constitution.

It has been clearly established for over thirty years that "seiz[ing] an unarmed, nondangerous suspect by shooting him dead" is an unreasonable seizure prohibited by the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). It is equally well established in the Fifth Circuit that, where the Fourth Amendment does not apply, substantive due process serves as a backstop. *Petta v. Rivera*, 143 F.3d 895, 901 & n.5 (5th Cir. 1998) (collecting unanimous court of appeals caselaw to that effect); *see also United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). And it is similarly clear that the Constitution's protections reach across the border. *See Verdugo-Urquidez*, 494 U.S. 259 ("the people" have Fourth Amendment rights outside U.S. borders); *see also Reid v. Covert*, 354 U.S. 1, 5–9 (1957) (plurality op.) ("[W]e reject the idea that when the United States acts against its citizens abroad it can do so free of the Bill of Rights."). Because seizing (by shooting to death) an unarmed, non-threatening, unresisting minor both is clearly "unreasonable," *see Garner*, 471 U.S. at 11, and clearly "shocks the conscience," *see Rochin v. California*, 342 U.S. 165, 172–73 (1952), any

reasonable officer in Mesa's shoes would have known killing Hernández was unconstitutional.[4]

B. An officer is not protected by qualified immunity if he acted without a reasonable factual basis to conclude that a potential exception applied.

Although it was clearly established at the time Mesa acted that killing someone without justification was unconstitutional, arguably this was not clearly established where the victim was a "citizen and resident of Mexico with no voluntary attachment to the United States." *See Verdugo-Urquidez*, 494 U.S. at 274–75 (holding that such a person has no Fourth Amendment protection against a warrantless search conducted in Mexico). One thus could argue that, as far as Mesa knew, Hernández *might* have been a Mexican citizen with no U.S. attachments, and that it therefore would have been unclear to a reasonable officer whether killing Hernández would violate the Constitution. In other words, the argument would be that Mesa is

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[4] An officer does not need to know the specific part of the Constitution his conduct violates; "the proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007) (collecting cases); *see also Al-Amin v. Smith*, 511 F.3d 1317, 1335 (11th Cir. 2008) ("We have never required that, in order for an official to know his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful.").

entitled to qualified immunity based on his lack of *factual* clarity about Hernández's status.

That argument is wrong. Qualified immunity is not available to an officer who violates a clear constitutional rule without a factual basis to conclude that an exception to the rule applies. The Court most recently confirmed this principle last Term in *Utah v. Strieff*, 136 S. Ct. 2056 (2016). In that case, an officer stopped and searched Strieff without cause, in violation of the Fourth Amendment's general prohibition of suspicionless searches and seizures. There happened to be an outstanding arrest warrant for Strieff, and the question before the Court was whether, in light of the warrant, application of the exclusionary rule was necessary. Strieff contended that it was necessary to deter police misconduct: "[B]ecause of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied." *Id.* at 2064; *see id.* at 2068–69 (Sotomayor, J., dissenting) (explaining that "[o]utstanding warrants are surprisingly common"). The Court specifically addressed this argument, concluding that the exclusion of evidence was unnecessary because the possibility of *civil liability* for police who engage in such searches and seizures is deterrence enough. *Id.* at 2064 ("Such wanton conduct would expose police to civil liability.").

The Court's reasoning thus rested upon the principle that an officer *is* subject to suit when he arrests and searches an individual without cause, if

he is unaware of facts that would authorize such a search and seizure. Said another way, the general Fourth Amendment rule requires officers to have probable cause to search someone. There is an exception to the rule for searches incident to arrest, which officers may undertake when, *inter alia*, they arrest someone on an outstanding warrant. But officers may not invoke that exception unless they know facts that would lead a reasonable officer to conclude the exception applied. They cannot claim qualified immunity on the ground that it was unclear whether the exception applied, because they lacked *factual* information relevant to the exception. And that is the case no matter how "prescient the officer's instincts may have been": Courts "cannot grant immunity for decisions merely because *ex post* they seem to have been good ones, any more than [they] could hold officers liable for decisions that seemed reasonable when made but subsequently turned out to be wrong." *Myers v. Patterson*, 819 F.3d 625, 636 (2d Cir. 2016). Qualified immunity is unavailable to an officer who violates a clear constitutional rule, unless he has an affirmative factual basis to conclude an exception to that rule applies.

Similarly, the Fourth Amendment generally requires that an officer have probable cause before swabbing someone's cheek for DNA, but there is an exception for people who have been arrested for violent crimes. *See Maryland v. King*, 133 S. Ct. 1958, 1980 (2013). When an officer swabs someone's cheek without any knowledge one way or the other

about whether she is an arrestee, that factual void does not permit the officer to claim qualified immunity for his conduct. And, to return to the example above, qualified immunity plainly does not protect the officer who conducts a suspicionless search without any factual basis for concluding that the person being searched is or is not a parolee. *Moreno*, 431 F.3d at 642.

Just so with other exceptions to Fourth Amendment rules. An officer is not immune when he searches someone's house without reason to think that valid consent was given (even if it turns out that it was). *Cf. Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990). An officer is not immune when he conducts a *Terry* frisk without reason to think that there was suspicious or dangerous behavior (even if it turns out that there was). And so on.

The same reasoning applies in the circumstances here. It is clearly established that an officer may not unjustifiably shoot someone. If an officer lacks knowledge of facts that could lead a reasonable officer to believe an exception to the general rule applies, the exception is inapplicable and qualified immunity is unavailable. "Such wanton conduct . . . expose[s] [the officer] to civil liability." *Strieff*, 136 S. Ct. at 2064.

C. Mesa acted without a reasonable factual basis to conclude that a potential exception applied.

Even if an officer might have reasonably believed the Constitution did not prohibit the unjustifiable

killing of a non-citizen without ties to the United States, the facts available to Mesa did not support a reasonable inference that Hernández fit that description. (Indeed, Mesa has never suggested otherwise.) Thus, on the facts known to Mesa, an officer would not have reasonably concluded that he could kill Hernández without violating the Constitution.

Mesa shot Hernández without knowledge that Hernández was a non-citizen who lacked connections to the United States. He knew simply that Hernández was a boy playing near the United States–Mexico border on the Mexican side, and that he was unarmed and nonthreatening. *See supra* Part I.B. With only these facts available, a reasonable officer would not have concluded that Hernández lacked citizenship in or ties to the United States.

As an initial matter, a reasonable officer would not have believed Hernández was a non-citizen simply because of where Hernández was standing at the time of the shooting—on the Mexico side of the border. Indeed, over a million U.S. citizens live in Mexico, with the largest concentration found on the U.S.–Mexico border. *See* Adam Taylor, *Mexico has its own immigration problem: American retirees*, WASH. POST (Nov. 21, 2014), goo.gl/6wPxZM; Ernesto Rodriguez Chavez & Salvador Cobo, *Extranjeros Residentes en Mexico*, INSTITUTO NACIONAL DE MIGRACIÓN, Tbl. 1 at 35 (2012), https://goo.gl/i7QZxy. And about six hundred thousand of those citizens are minors, just like Hernández. *See* Santiago David

Távara, *Niños nacidos en EE.UU. que viven en México necesitan documentos*, EL TIEMPO LATINO (Feb. 25, 2015), goo.gl/AGCVno.

Many millions more citizens travel to and from Mexico on a regular basis, especially in the El Paso area. With its population of 2.5 million people, the El Paso–Juarez–Las Cruces region is "one of the largest binational regions in the world." Alana Semuels, *Crossing the Mexican-American Border, Every Day*, THE ATLANTIC (Jan. 25, 2016), goo.gl/d5lVp8 (hereinafter "*Crossing the Mexican-American Border*"). U.S. citizens and U.S. residents regularly travel back and forth for school, for work, or for family. *Id.*; *see* U.S. State Department, *U.S. Relations With Mexico: Fact Sheet*, BUREAU OF PUBLIC AFFAIRS (July 12, 2016), goo.gl/XQQa8O. There is even a Spanish word—*transfronterizos*—for young U.S. citizens whose families have returned to Mexico but who cross the border each day to attend American schools. *See* Patricia Leigh Brown, *Young U.S. Citizens in Mexico Brave Risks for American Schools*, N.Y. TIMES (Jan. 16, 2012), goo.gl/IeU6Q4. "[T]he borderland has evolved into an increasingly interdependent regional space" that is "highly integrated" and that "largely ignores the international boundary." Wilson Center, *The State of the Border Report: A Comprehensive Analysis of the U.S.-Mexico Border*, BORDER RESEARCH P'SHIP 30–31 (May 2013), goo.gl/j8z8Wm. It would not have been reasonable for Mesa to conclude that Hernández was a non-citizen based on his presence at the place he was killed.

Nor would it have been reasonable to conclude that Hernández was a non-citizen based on his race or color. Linking race and color to citizenship is, to say the least, not reliable in this country. As of July 2014, fifty-five million Hispanic Americans lived in the United States, many in Southern Texas. *See* United States Census Bureau, *FFF: Hispanic Heritage Month 2015* (Sept. 14, 2015), goo.gl/BapNmh. Mesa is himself an Hispanic American.

Moreover, the facts known to Mesa could not have supported a reasonable conclusion about Hernández's U.S. connections. Had Hernández just returned from school in the United States? "Thousands of people cross both ways over the border every day," including "Mexican elementary kids heading to U.S. public schools." *See Crossing the Mexican-American Border*. Did Hernández have family in the United States? In one nearly identical case out of Arizona, a border patrol agent shot a boy, in Mexico. It turned out that the boy, like thousands of other Mexicans living near the border, "had strong familial connections to the United States. Both his grandparents were legal permanent residents (now citizens) of the United States residing in Nogales, Arizona." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1036 (D. Ariz. 2015). These questions and more would have been impossible for an officer to reasonably answer based on the quick look Mesa got of Hernández.

Holding that an officer could have reasonably inferred that Hernández was a non-citizen without

ties to the United States, and that Mesa is entitled to qualified immunity on that basis, would have frightening implications. It would mean that officers could viciously shoot *anyone* on the Mexican side of the border and be entitled to qualified immunity, unless they had information affirmatively showing that the victim *was* a U.S. citizen or *did* have U.S. connections. This would apply as much to U.S. citizens as to non-citizens. If simply being on the Mexican side of the border gives an officer grounds to reasonably believe that the victim is a non-citizen without U.S. connections, and if this entitles the officer to immunity, then the officer gets immunity even when it turns out that the victim is a U.S. citizen or has U.S. connections. *Cf. Pearson*, 555 U.S. at 231 (stating that qualified immunity applies when the official's error is a mistake of fact or a mistake of law). The Government conceded as much below, arguing that qualified immunity protects an officer who takes "a risk" that he is violating constitutional rights by shooting someone who "turn[s] out to be a U.S. citizen." Gov't En Banc Br., 2015 WL 136278, at *47. The Government's striking nonchalance aside, that cannot be the law.

None of this is to say that one's citizenship status or connections to the United States are always irrelevant in the qualified-immunity analysis. They may be relevant if, at the time an officer acts, he knows facts that bear on an individual's citizenship or connections. Assume, for example, that just before a shooting like this one, the victim had shown the officer her Texas ID, pleading for the officer to

treat her better because she was a United States citizen. That fact would be relevant to the analysis. Or assume that just before this shooting, Hernández had told Mesa that he was a Mexican citizen and had never been to the United States. Those facts would be relevant. Or assume that officials use a drone strike to kill people in Pakistan, who they have strong reason to believe are non-citizen terrorists. Those facts would be relevant. But nothing of the sort happened here.

Moreover, as discussed above, *see supra* at 2, Hernández's citizenship status and connections to the United States may indeed be relevant in this case, just not in the "clearly established" part of the analysis. They may bear on the question of whether Mesa violated the Constitution, if the Court determines that the Fourth or Fifth Amendment's extraterritorial reach depends upon the victim's citizenship status and connections. But once the Court answers (or assumes the answer to) that question, facts unknown to Mesa are not taken into account *again* at the "clearly established" stage.

Because a reasonable officer would not have believed that it was constitutional to shoot Hernández in the circumstances known to Mesa, qualified immunity does not shield Mesa's conduct.

III. PROTECTING MESA FROM LIABILITY HERE UNDERMINES RATHER THAN FURTHERS THE GOALS OF QUALIFIED IMMUNITY

Immunizing Mesa would further none of the goals underlying qualified immunity, and would instead severely undermine them. The doctrine was never meant to "provide [a] license to lawless conduct." *Harlow*, 457 U.S. at 819. Yet that is all immunizing Mesa would do.

A. Qualified immunity applies only when it furthers the doctrine's purposes.

Qualified immunity is a judicially created doctrine designed to strike a careful balance between two "fundamentally antagonistic social policies": vindicating constitutional guarantees on the one hand, and immunizing reasonable officials on the other. *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (plurality op.); *see Pearson*, 555 U.S. at 231. When extending immunity fails to strike the right balance between those competing goals, the Court should not apply it.

As to the first goal, it has been an "indisputable rule" since before our founding that remedies generally accompany rights. 3 WILLIAM BLACKSTONE, COMMENTARIES *23, *109; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.). It thus "go[es] without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others . . . should not escape liability for the injuries he may so cause; and, if it were possible in

practice to confine such complaints to the guilty, it would be monstrous to deny recovery." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.).

Yet on the other side of the balance, courts have long recognized that it is vital to the effective functioning of government to protect officials who behave reasonably. Since common law, lower executive-branch officials have been immunized when they do their jobs "reasonably," even if they violate the law. *Imbler v. Pachtman*, 424 U.S. 409, 419 (1976) (collecting cases); *see also, e.g.*, *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The Court has imported this common-law immunity into *Bivens* actions when the history and "general policy considerations" behind the immunity support applying the doctrine. *Butz v. Economou*, 438 U.S. 478, 500–04 (1978); *see Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

In developing the qualified-immunity doctrine—and in maintaining the careful balance between the doctrine's competing goals—the Court asks "[w]hether the immunity doctrine's *purposes* warrant immunity." *Richardson v. McKnight*, 521 U.S. 399, 407 (1997). Because immunity "has in large part been of judicial making," *Butz*, 438 U.S. at 501–02, the Court has "forthright[ly]" "revis[ed] the immunity defense for policy reasons." *Crawford-El v. Britton*, 523 U.S. 574, 595 n.15 (1998); *see, e.g.*, *Harlow*, 457 U.S. at 815–16. The doctrine must strike the proper "balance between the evils

inevitable in any available alternative." *Harlow*, 457 U.S. at 813.

B. Granting immunity here furthers none of the doctrine's purposes.

"[T]he reasons [the Court] ha[s] given for recognizing immunity . . . counsel[] against" applying it here. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012); *see Tower v. Glover*, 467 U.S. 914, 920 (1984). Officials should be given immunity when they make "reasonable mistakes . . . as to the legal constraints on particular police conduct" or as to the facts on the ground. *Saucier*, 533 U.S. at 205. That is because often "the public interest calls for [official] action which may turn out to be founded on a mistake." *Gregoire*, 177 F.2d at 581. For the sake of "the effective functioning of government," an officer who engages in such conduct enjoys immunity, *Butz*, 438 U.S. at 481—"even although an individual may suffer by his mistake," *Kendall v. Stokes*, 44 U.S. 87, 98 (1845).

This serves three functions. *First*, and most importantly, it ensures that officers will not discharge their duties with "unwarranted timidity"—that they will not hesitate to properly execute the law because they fear being sued. *Richardson*, 521 U.S. at 408. By removing the specter of liability, qualified immunity offers officials a "zone of protection," *Butz*, 438 U.S. at 501, "breathing room to make reasonable but mistaken judgments," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Knowing that they will be immunized if they act reasonably, officers can act "with the

decisiveness and the judgment required by the public good," *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), and "vigorous[ly] exercise [their] official authority," *Butz*, 438 U.S. at 506.

Second, qualified immunity "ensure[s] that talented candidates [will] not [be] deterred by the threat of damages suits from entering public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). Society wants "able people" to serve, *Harlow*, 457 U.S. at 816, but the threat of lawsuits for even reasonable mistakes understandably may prevent those people from entering public service.

Third, qualified immunity heads off "insubstantial" claims, protecting against the unwarranted "disruption of government." *Id.* at 818. Government officers have important duties to discharge, and should not have to ignore those duties to come to court each time a plaintiff creates a factual dispute sufficient to get past summary judgment. The doctrine of qualified immunity allows a court to assess cases up front, and screen out those where officials' actions were objectively reasonable.

"These rationales are not transferable" to Mesa. *Wyatt*, 504 U.S. at 168. *First*, denying immunity for the type of conduct at issue here would not hamper legitimate law enforcement efforts of border agents. If border agents were aware that immunity is unavailable for such conduct, they would not be less willing to use force in the future—when the circumstances call for it. That is because the circumstances alleged in the Complaint clearly did not call for deadly force. Border agents thus still

have plenty of "breathing room to make reasonable but mistaken judgments." *al-Kidd*, 563 U.S. at 743.

Second, denying Mesa immunity plainly would not deter people from entering public service. Apart from those with sadistic motives, no reasonable person would avoid becoming a border agent because he cannot use deadly force on a nonthreatening fifteen-year-old just across the border. Any individuals who would avoid the job for that reason *should* be deterred; they are not the "able people" the public seeks. *Harlow*, 457 U.S. at 816.

Third, denying immunity here would not invite insubstantial claims. An innocent boy was shot and killed without any justification, and his family has strong claims that he should recover under the Constitution. Mesa may prevail at summary judgment or at trial, if it turns out that the facts do not align with the allegations in the Complaint. But at this point, under these facts, Hernández's claims are anything but "insubstantial."

Mesa's conduct was not remotely close to the kind of "reasonable mistake" qualified-immunity doctrine seeks to protect. Even if Mesa's conduct was not malicious, it was "an unacceptable error indicating gross incompetence or neglect of duty," "outside the range of the professional competence expected of an officer." *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986). Every officer should know not to kill a defenseless and nonthreatening boy, no matter his citizenship status. Immunity in these circumstances would reward Mesa for behavior that was, to say the least, obviously unlawful.

Qualified immunity aims "to safeguard government, and thereby to protect the public at large," not "to benefit its agents." *Wyatt*, 504 U.S. at 168. But applying it here would achieve the opposite result: It would benefit an unfit agent, at the expense of an innocent child, his family, and the public at large, and without benefit to any government interest. Qualified immunity is inappropriate.

C. Immunizing Mesa undermines the goals of qualified immunity.

Though there is no reason to grant immunity, there is plenty of reason to deny it. The value on the other side of the balance—ensuring the "vindication of constitutional guarantees," *Butz*, 438 U.S. at 481—applies with full force.

Border agents' immunity is "qualified" for a reason. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. That is the principal reason why the Court has denied "absolute immunity to most public officers." *Id.*; *see Butz*, 438 U.S. at 505. "There must indeed be means of punishing public officers who have been truant to their duties." *Gregoire*, 177 F.2d at 581. The law thus allows plaintiffs with legitimate constitutional claims to proceed with their case when the officer acted unreasonably. That is this case.

Permitting this case to proceed offers petitioners the chance to vindicate Hernández's constitutional

rights. If the Court reaches the question of immunity, it will have held (or assumed) that the Complaint states a valid constitutional claim, and that a right of action exists. To nonetheless dismiss this case on immunity grounds, in the face of unreasonable officer conduct, would unfairly and prematurely deny a remedy.

The qualified nature of an official's immunity has another important consequence. Imposing liability upon officers who act unreasonably not only vindicates victims' constitutional rights but also deters rogue officers who would otherwise act unlawfully. That is of course the intended effect of civil tort suits—to "deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner." *Barr*, 360 U.S. at 576 (plurality op.). Thus, if this case proceeds, border agents in the future may be less likely to "us[e] the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt*, 504 U.S. at 161. A ruling that immunity does not protect Mesa will properly deter future officers from engaging in lawless conduct, while any other result will lead to under-deterrence.

A civil suit in some instances may be the *only* thing that deters officers from engaging in "wanton conduct." *E.g.*, *Strieff*, 136 S. Ct. at 2064. That seems to be the case here. Unless this case is permitted to proceed, Mesa will likely never be held to account for his egregious conduct, and his very public example may invite future officer misconduct. Indeed, the United States declined to prosecute

Mesa, and it has refused to extradite him to Mexico so that he can be prosecuted there. *See* DOJ Press Release, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012), goo.gl/i3WuPt; Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. TIMES (Oct. 17, 2016), goo.gl/whVTIR. The Court has the chance to avoid that troubling result, and in the process allow the Hernández family to vindicate their son's constitutional rights. It should hold that qualified immunity does not protect Mesa.

* * *

Executive officers have never been protected from liability for "discharg[ing] their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule." *Butz*, 438 U.S. at 507. Immunizing Mesa breaks from that precedent, furthers no legitimate purpose, and disserves the goal of remedying wrongs. The Court should not do it.

For these reasons, we urge the Court to hold that, if a cause of action and a constitutional claim exist, this litigation may proceed. Mesa does not deserve immunity.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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